$261,875.95, applying to the excess volume the unit price of $2.775 per m^2. On the other hand, the Sub-Contractor emphasised that the clause in question only referred to accidental loss and it had no application since the Arbitrator had found as a fact that there had been "very minimal accidental loss" of the filter cloth. Learned counsel finally submitted that the "designed area" must mean the area to be laid in the event and as provided for by the "shop drawings." We are persuaded by the submissions advanced on behalf of the Sub-Contractor and like the High Court we also answer the third question in favour of the Sub-Contractor.

Before we part with this judgment we must refer to a matter which the Main Contractor had specifically invited us to put right. One of the issues canvassed in the High Court, but which was no longer in contention before us, was whether the Main Contractor had accepted the conditions of the said letter of February 7, 1974, including paragraph (i) thereof. The Main Contractor felt that the following passage of the judgment of the High Court could be misunderstood as suggesting some fraud or wrongdoing on their part:

"In my opinion, the (Main Contractor) should have stated clearly during the negotiations the condition (i) in page 2 of the (Sub-Contractor's) letter of 7.2.74 regarding the measurement of Class A & B stones by pontoon loads was not acceptable to them, in which event the (Sub-Contractor) would no doubt have revised again their quotations contained in page 1 thereof to allow for losses due to overdumping, subsidence, wave action etc. By keeping quiet and giving the (Sub-Contractor) the impression that all the conditions in their letter of 7.2.74 were acceptable, the (Main Contractor) were, in fact, denying the (Sub-Contractor) an opportunity to revise again their quotations. The (Main Contractor) cannot now claim that they did not accept the conditions relating to pontoon loads measurements of Class A and B stones. I would be condoning a fraud on the (Sub-Contractor) if I accepted the (Main Contractor's) contention that they had not agreed that the Class A and B stones should be measured by the pontoon loads before discharge."

Learned counsel for the Main Contractor pointed out, and we accept, that no fraud or any form of deception was alleged against the Main Contractor at any stage of the proceedings. Any suggestion that the Main Contractor in contesting the issues raised in this appeal was guilty of any fraud or any attempted fraud was, in our view, wholly unwarranted. Seeing that the word "fraud" was expressed in a conditional manner we are of the view that the choice of the phrase was unfortunate and its use was intended to convey no more than that the case for the Sub-Contractor was so strong that to assert the contrary would be quite lacking in merit.

For the reasons given in this judgment, we would dismiss the appeal with costs. The security for the costs of the Sub-Contractor may be paid to the Sub-Contractor or its solicitors.

Appeal dismissed.

Solicitors: *Donaldson & Burkinshaw; Yap & Yap.*

GOH GIN CHYE & ANOR. v. PECK TECK KIAN REALTY PTE. LTD. & ANOR.

[C.A. (Wee Chong Jin C.J., Thean & Coomaraswamy JJ.) April 9, 1987]

[Singapore – Civil Appeal No. 74 of 1983]

Landlord and Tenant – Whether "tenancy" or bare "licence" – Effect of agreements – Principles applied.

The first respondents are the owners of certain premises which were governed by the Control of Rent Act (Cap. 266). Their predecessors in title granted to one Tay Ping Kee, since deceased, a monthly tenancy of the ground floor of the premises at a certain rent.

The first respondents claimed vacant possession of the said premises on the grounds that the premises were sublet to the second respondent in breach of a covenant and that the subletting rent was in excess of the aggregate of 110% of the recoverable rent paid for the premises.

The claim was against the appellants who were the administrators of the estate of the deceased, Tay Ping Kee.

The parties relied on a series of agreements made between Tay Ping Kee and the appellants on the one hand and the second respondent on the other. It was not disputed that most of these agreements were expressed as "licence agreements."

The learned District Judge held that the first respondents were entitled to recover as against the appellants vacant possession of the said premises but he dismissed the claim against the second respondent. The appellants' appeal to the High Court was dismissed, and they appealed to the Court of Appeal.

Held, dismissing the appeal: (1) the intention of the parties is an important consideration in determining the relationship of landlord and tenant as in all other contractual relationships but in every case the intention "must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances." What the parties said or professed in the agreement alone is not enough; it does not alter what is, in effect, a tenancy into a licence, and *vice versa;*

(2) the relationship of the parties is determined by law,

having regard to all the relevant circumstances and not by the label they chose to put on the agreement;

(3) a material circumstance in the consideration of the relationship of landlord and tenant is exclusive possession of the property enjoyed by the occupier and exclusive possession is an essential requirement of a tenancy. However, exclusive possession is also not the sole and only criterion; there may be other circumstances negativing an intention to create a tenancy;

(4) in the present case the circumstances and the conduct of the parties show that what was intended was that the second respondent should be granted, and he was granted, exclusive possession of the said premises at a rent and for a term to carry on his business. The occupation by the second respondent had all the features of a tenancy;

(5) apart from the forms of the "licence" agreements made, there was no circumstances which negatived the intention to create the relationship of landlord and tenant. The "licence" agreements were ineffectual to turn a tenancy into a licence.

Cases referred to:

(1) *Errington* v. *Errington and Woods* [1952] 1 K.B. 290, 298.
(2) *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386.
(3) *Addiscombe Garden Estates Ltd. & Anor.* v. *Crabbe & Ors.* [1958] 1 Q.B. 513.
(4) *Abdul Rahim* v. *British And Malaya Trustees Ltd.* [1967] 1 M.L.J. 118.
(5) *Street* v. *Mountford* [1985] A.C. 809.
(6) *Booker* v. *Palmer* [1942] 2 All E.R. 674.
(7) *Cobb* v. *Lane* [1952] 1 T.L.R. 1037.

COURT OF APPEAL.

Y.R. Jumabhoy (*V.K.S. Narayanan* with him) for the appellants.

Gan Choo Beng for the 1st respondents.

P. Balagopal for the 2nd respondent.

Cur. Adv. Vult.

Thean J. (delivering the Judgment of the Court): This appeal arose out of an action brought by the 1st respondents in the District Court against the appellants and the 2nd respondent for recovery of vacant possession of the ground floor of a two-storey shophouse, known as No. 71, Kampong Bahru Road, Singapore. The 1st respondents are the owners of the premises, which are premises within the meaning of the Control of Rent Act (Cap. 266). Their predecessors in title granted to one Tay Ping Kee, since deceased, a monthly tenancy of the said ground floor ("the said premises") at a monthly rent of $40 per month initially and subsequently at $25 per month which was later raised to $26 per month. The appellants are the administrators of the estate of Tay Ping Kee deceased. The claim for possession of the said premises was founded on two grounds, namely:-

(i) that the said Tay Ping Kee deceased sublet or parted with possession of the said premises to the 2nd respondent in breach of a covenant not to assign, sublet or part with possession of the said premises or any part thereof without the prior consent of the owners, and

(ii) that the said Tay Ping Kee deceased received in respect of the subletting rent in excess of the aggregate of 110% of the recoverable rent paid for the said premises and that after the death of the said Tay Ping Kee, the appellants continued to collect rent in respect of the sub-tenancy in excess of the said limit.

Before the learned District Judge, the dispute between the parties resolved into three issues: (i) whether there was a prohibition against subletting; (ii) whether there was a subletting, and (iii) whether the rent received from the 2nd respondent was in excess of the aggregate of 110% of the recoverable rent paid for the said premises. The learned District Judge found that the 1st respondents had not discharged the burden of proving that there was a prohibition against subletting, and accordingly, the first ground for recovery of vacant possession failed. On the second issue, the learned District Judge found that there was a subletting of the said premises to the 2nd respondent and rejected the appellants' plea that only a licence was granted to the 2nd respondent. On the third issue, the learned District Judge found that the rent received from the 2nd respondent was in excess of the aggregate of 110% of the recoverable rent paid for the said premises. Accordingly, he held that the 1st respondents were entitled to recover as against the appellants vacant possession of the said premises, but he dismissed the claim against the 2nd respondent.

Against the decision of the learned District Judge, the appellants appealed to the High Court. The High Court affirmed the finding of the learned District Judge that there was a subletting of the said premises to the 2nd respondent in spite of the several successive agreements which were described as "licence agreements" and that the rent received from the 2nd respondent was in excess of the aggregate of 110% of the recoverable rent paid for the said premises, and dismissed the appeal with costs. Against that decision this appeal was brought, and at the conclusion of the hearing of the appeal we dismissed it with costs.

The point canvassed before us was that the 2nd respondent was a licensee, and not a sub-

tenant, of the said premises and reliance was placed on a series of agreements made between the late Tay Ping Kee and the 2nd respondent and the last agreement made between the 2nd appellant, as the administrator of the estate of Tay Ping Kee deceased, and the 2nd respondent. It was argued on behalf of the appellants that the learned Judge in the High Court did not apply his mind to the question whether the agreements made created a licence or a tenancy of the said premises, that this question turned on the intention of the parties to be gathered not only from the evidence adduced but also from the agreements executed by them, and that if the learned Judge had approached the question with this point in mind he would have found that the agreements created a licence. We rejected this argument.

There were altogether six agreements between the late Tay Ping Kee and the 2nd respondent made successively in 1961, 1964, 1967, 1970, 1973 and 1975 and one agreement made in 1977 between the 2nd appellant, as the administrator of the estate of Tay Ping Kee deceased, and the 2nd respondent. The first two agreements made in 1961 and 1964 respectively were tenancy agreements, under which the late Tay Ping Kee agreed to sublet the said premises to the 2nd respondent at the rent and on the terms and conditions therein respectively provided, and each tenancy agreement provided for a term of three years; the first agreement expired on November 30, 1964, and the second agreement on November 30, 1967. On the expiry of the second agreement, the third agreement dated November 30, 1967, was made, but this agreement was expressed to grant to the 2nd respondent a licence to use the said premises for a term of 3 years, the 2nd respondent paying to the late Tay Ping Kee a sum of $150 per month as licence fee. The other terms thereof were substantially similar to those found in a tenancy agreement but with necessary and consequential changes including changes in certain terminologies, such as "Sub-tenant" to "Licensee," "rental" to "Licence fee" and "Sub-tenancy" to "Licence." In addition, it contained the following provision in clause 6:

"(ii) That the Licensee shall in no way hold himself out as a Tenant or a sub-tenant of the Licensed Site but his status shall be that of a bare Licensee with the rights and liabilities of a bare Licensee in law save for the right of enjoyment conferred on the Licensee pursuant to clause (5) hereof."

Subsequent agreements made successively in 1970, 1973 and 1975 were also each expressed to give to the 2nd respondent a licence to use the said premises. The 1970 agreement was drafted in a more expanded form than the earlier agreement with a couple of clauses added thereto. But for some inexplicable reasons the two subsequent agreements were drafted in an abbreviated form; several provisions, which were present in the earlier agreements, were deleted, and in particular, the provision quoted above did not appear in either of these agreements. After the death of Tay Ping Kee, the 2nd appellant made a similar agreement with the 2nd respondent in 1975 with the "licence fee" increased to $300 per month and with other changes in the terms which are not material for the purpose of this appeal. Here again the clause quoted above did not appear in this agreement.

Commencing with the first agreement, which was a tenancy agreement, the 2nd respondent had been having exclusive possession of the said premises for the purpose of carrying on his business of an eating shop. When the third agreement was made, which was expressed to grant to him a licence to use the said premises, he remained in exclusive possession of the said premises and continued to carry on his business there as before. There was no change in the circumstances relating to his occupation of the said premises. There was only a change in the form of the agreements made between the parties. Hence, the only factor on which the appellants could rely, and they did so rely, was that both parties to the agreements made in 1967 and subsequently agreed expressly that a licence was created. In our opinion, the mere change in the form of the agreements did not succeed in converting what was, in effect, a tenancy into a licence. "Parties cannot turn a tenancy into a licence merely by calling it one," per Denning L.J. (as he then was) in *Errington* v. *Errington and Woods.*[1] This was clearly demonstrated in the case of *Facchini* v. *Bryson.*[2] There, an employer let his employee into occupation of a house in consequence of his employment at weekly sums payable by the latter. The house was not let for the better performance of his duty and the employee was therefore not a service occupier. The agreement expressly stipulated, amongst other things, the following: "nothing in this agreement shall be construed to create a tenancy between the employer and the assistant." Notwithstanding such an express term, the Court of Appeal in England held that a tenancy was created. Denning L.J. said, at pages 1389-1390:

"We have had many cases lately where an occupier has been held to be a licensee and not a tenant. In addition to those which I mentioned in *Errington* v. *Errington* [1952] 1 K.B. 290 we have recently had three more, *Gorham (Contractors) Ltd.* v. *Field* (unreported), *Forman*

v. *Rudd* (unreported), and *Cobb* v. *Lane* [1952] 1 T.L.R. 1037. In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all. In the present case, however, there are no special circumstances. It is a simple case where the employer let a man into occupation of a house in consequence of his employment at a weekly sum payable by him. The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put on it: *Commissioners of Customs and Excise* v. *Pools Finance* [1952] 1 T.L.R. 797. It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven – I will not in these days say a coach and four – but an articulated vehicle."

In *Addiscombe Garden Estates Ltd. and Anor.* v. *Crabbe and Ors.*[3] the plaintiffs expressly by a written agreement purported to "license and authorise" the defendants to use and enjoy certain premises and amenities therein for a term of two years in consideration of a payment of certain fees. The Court of Appeal in England, upon a detailed examination of the agreement, came to the conclusion that a tenancy was created, notwithstanding that the document was described by the parties as a licence and the draftsman had "studiously and successfully avoided" the use either of the word "landlord" or the word "tenant" throughout the document. Jenkins L.J. said at p. 522:

"As to the first question – whether the so-called licence of April 12, 1954, in fact amounted to a tenancy agreement under which the premises were let to the trustees – the principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that a document described as a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence."

And he later said, at p. 528:

"The present case, of course, has nothing to do with the Rent Acts, but the important statement of principle is that the relationship is determined by the law, and not by the label which parties choose to put on it, and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties."

In both these cases, the courts in England held that the parties could not by mere words or express provisions in an agreement turn what was, in effect, a tenancy into a licence. The same principle was applied, though producing the opposite result, in the case of *Abdul Rahim* v. *British And Malaya Trustees Ltd.*[4] There, by an agreement in a printed form the owner granted to the occupiers the use of a space in a common passage of a building called The Arcade on a "monthly tenancy" at a "rent" of $40 per month. Winslow J. held that notwithstanding the express tenancy agreement in the printed form only a contractual licence terminable by one month's notice had been created. He arrived at this conclusion on the following grounds. First, he held that the intention of the parties must be sought not only from the mere words of the contract but the substance thereof and the conduct of the parties. Secondly, he found (i) that the space "let out" was not adequately demarcated with precision, (ii) that the control of the entire Arcade was at all times vested in the owner and the occupiers had no exclusive possession of the space "let out" to them, and (iii) that the "rent" included "an element for the use of electric power" supplied by the owner. On appeal, the Court of Appeal affirmed his decision that the agreement did not create a tenancy but a contractual licence terminable by one month's notice. Chua J. said, at p. 119:

"It is clear from the authorities that in determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee, the intention of the parties is the paramount consideration. The intention of the parties must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances."

The leading authority on the point is the decision of the House of Lords in the case of *Street* v. *Mountford*.[5] There, Mr. Street by an agreement in writing granted to Mrs. Mountford a right to occupy furnished rooms in a residential house at "licence fee" and subject to certain terms and conditions provided therein. The agreement expressly stated that the right of occupation was a "personal licence" and was not assignable and that the "licence" was terminable on 14 days' written notice by either party. Further, one of the terms expressly agreed upon by Mrs. Mountford was as follows:

"I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts."

Pursuant to the agreement Mrs. Mountford was let into exclusive possession of the rooms, and the issue before the court was whether she was a licensee or a tenant. The Court of Appeal in England held that she was a licensee but on appeal the decision was reversed; the House of Lords held that she was a tenant. Lord Templeman said, at p. 819:

"In the present case, the agreement dated March 7, 1983 professed an intention by both parties to create a licence and their belief that they had in fact created a licence. It was submitted on behalf of Mr. Street that the court cannot in these circumstances decide that the agreement created a tenancy without interfering with the freedom of contract enjoyed by both parties. My Lords, Mr. Street enjoyed freedom to offer Mrs. Mountford the right to occupy the rooms comprised in the agreement on such lawful terms as Mr. Street pleased. Mrs. Mountford enjoyed freedom to negotiate with Mr. Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for annual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

Numerous cases were considered by Lord Templeman in his speech, including *Facchini* v. *Bryson* (*supra*) and *Addiscombe Garden Estates Ltd. and Anor.* v. *Crabbe and Ors.* (*supra*), and on the former he said, at p. 822:

"The decision, which was thereafter binding on the Court of Appeal and on all lower courts, referred to the special circumstances which are capable of negativing an intention to create a tenancy and reaffirmed the principle that the professed intentions of the parties are irrelevant. The decision also indicated that in a simple case a grant of exclusive possession of residential accommodation for a weekly sum creates a tenancy."

The results of these cases are as follows. First, the intention of the parties is an important consideration in determining the relationship of landlord and tenant, as in all other contractual relationships, but in every case the intention "must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances." What the parties said or professed in the agreement alone is not enough, it does not alter what is, in effect, a tenancy into a licence, and *vice versa*. Secondly, the relationship of the parties is determined by law, having regard to all the relevant circumstances, and not by the label they choose to put on the agreement. The "consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence." Thirdly, a material circumstance in the consideration of the relationship of landlord and tenant is exclusive possession of the property enjoyed by the occupier, and exclusive possession is an essential requirement of a tenancy. Lord Templeman in *Street* v. *Mountford* (*supra*) said, at page 818:

"There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments. The grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier."

Lastly, exclusive possession is also not the sole and only *criterion;* there may be circumstances negativing an intention to create a tenancy. Such circumstances are numerous. In *Booker* v. *Palmer,*[6] a landowner allowed an evacuee, whose house had been destroyed by bombs during the war, to stay in his house rent free throughout the duration of the war, and the Court of Appeal held that in those circumstances there was no intention to create legal relationship and no tenancy was therefore created. In *Errington* v. *Errington and Woods,*[1] a father bought a house for his son and daughter-in-law to live. He paid the initial sum and the balance of the purchase price was financed by a building society. It was agreed between him and his son and daughter-in-law that the instalments to the building society would be paid by them, and so long as they paid the instalments, they would be allowed to live in the house. It was held by the Court of Appeal that no tenancy was created in favour of the son and daughter-in-law. Denning L.J. (at pp. 297-298) gave many instances of circumstances negativing an intention to create the relationship of landlord and tenant, notwithstanding that exclusive possession of the premises was enjoyed by the occupier concerned, and he then said, at page 298:

"The result of all these cases is that, although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a

tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only."

Again, in the case of *Cobb* v. *Lane*,[7] a sister bought a house and allowed her brother to live there with his family without paying any rent, and the sister paid the rates. After the sister passed away, her personal representative claimed possession of the house and it was held that no tenancy had been created as there was no intention to create any legal relationship.

Applying the principles to the facts of the present case, there can hardly be any doubt that the 2nd respondent was at all material times a subtenant of the said premises. He was let into possession of the said premises, paying the rent therefor to the late Tay Ping Kee and, after his death, to the appellants. Apart from the forms of the "licence" agreements made, there was no circumstance which negatived the intention to create the relationship of landlord and tenant. The "licence" agreements were ineffectual to turn a tenancy into a licence. The circumstances and the conduct of the parties show that what was intended was that the 2nd respondent should be granted, and he was granted, exclusive possession of the said premises at a rent and for a term to carry on his business. The occupation by the 2nd respondent had all the features of a tenancy, and a tenancy it was that was created. Accordingly, the appeal failed.

Appeal dismissed.

Solicitors: *V.K.S. Narayanan; Chu Chan Gan & Ooi; Chan Kam Foo & Associates.*

THE "BENOI VI" SINDO TIMBER ENTERPRISES (PTE.) LTD. v. THE "BENOI VI", OWNERS & ORS.

[C.A. (Wee Chong Jin C.J., Thean & Chua JJ.) November 18, 1986]

[Singapore – Civil Appeal No. 55 of 1985]

Shipping Law – "Perils of the sea" – Meaning of.

Under a fixture note made between the appellants and the second respondents, there was shipped on "Benoi VI", a dumb barge, belonging to the first respondents, 994 pieces of Indonesian ramin round logs for carriage from Indonesia to Singapore. "Benoi VI" was towed by the tug boat "Donna." When the vessels arrived in Singapore almost all the logs were missing. The insurers were informed. An investigation was carried out by a firm of marine surveyors and consultants which concluded that "the loss of the cargo is attributable to the heavy weather prevailing during the period the vessel was proceeding to Singapore."

Acting on the report of the surveyors, the insurers made payment for the loss of the logs in the sum of $103,304.65. The insurers then commenced this subrogated action. The appellants' claim for damages for the loss of the logs was dismissed by the High Court with costs. They appealed to the Court of Appeal. The main issue was whether the loss of the logs was caused by perils of the sea in the course of the voyage.

Held, dismissing the appeal: (1) in general the term "perils of the sea" refers only to fortuitous accidents or casualties of the seas and does not include the ordinary action of the winds and waves. Whether in any particular case there is a peril or not is a question of fact;

(2) in the present case the loss was occasioned by the perils of the sea.

Cases referred to:

(1) *Thomas Wilson, Sons & Co.* v. *Owners of Cargo per the Xantho* (1887) 12 App. Cas. 503, 509.

(2) *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887) 12 App. Cas. 484, 502.

(3) *Grant, Smith and Co. and McDonnell, Ltd.* v. *Seattle Construction and Dry Dock Co.* [1920] A.C. 162, 171.

HIGH COURT.

Loh Boon Huat (*Shirley Dhillon* (*Miss*) with him) for the plaintiffs.

Cheong Yuen Hee (*Roy Chua* with him) for the second defendants.

Cur. Adv. Vult.

Sinnathuray J.: This action was heard on July 1, 1985 pursuant to the decision of the Court of Appeal given on January 14, 1980, that the case be remitted to the trial Judge to call upon the defence as I had earlier, on September 20, 1979, at the conclusion of the hearing of the plaintiffs' case, dismissed the plaintiffs' claim with costs.

Before I consider the defence, I should mention that there is another decision of the Court of Appeal pertaining to this case. On October 26, 1982 the Court ordered that the evidence of one Shahidan bin Ahmad be taken *de bene esse* before me. As it was not done earlier, at the continued